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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO ORTEGA, et al., Defendants and Appellants.	B288829 (Los Angeles County Super. Ct. No. PA086344)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Hayden Zacky, Judge. Affirmed and remanded for further proceedings.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant Francisco Ortega.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant Hugo Lara.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Tarlye and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendants Francisco Ortega and Hugo Lara guilty of gang-related murder and possession of a firearm by a felon, and the trial court sentenced them each to a term of 95 years to life.

On appeal defendants contend[1] that the trial court erred when it denied their motion to acquit, arguing, among other things, that the testimony of an accomplice was not sufficiently corroborated by independent evidence linking them to the crimes. Defendants further contend that the trial court committed instructional error by: refusing to instruct that one of the eyewitnesses to the crimes was an accomplice as a matter of law; misinstructing the jury on the differences between two instructions on the use of accomplice testimony; failing to instruct the jury that one of the eyewitnesses could have been an accomplice under the natural and probable consequences doctrine; and instructing the jury that accomplice testimony could be used to convict as long as it was supported by "slight" independent corroborating evidence. And, in supplemental briefs, defendants argue that the matter should be remanded for further sentencing proceedings under recently modified Penal Code sections that grant trial courts discretion to dismiss certain firearm and prior serious felony conviction enhancements.

We agree with defendants that the matter must be remanded for further proceedings so that the trial court may determine whether to exercise its discretion to strike the prior serious felony conviction enhancements. We otherwise affirm.

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1 Each defendant joins in the arguments of the other.

II. FACTUAL BACKGROUND

A. *Prosecution's Case*

On May 15, 2016, Andy Garcia lived near the intersection of Orion Avenue and Chase Street in North Hills. At approximately 3:00 a.m., he was awakened at home by the sound of multiple gunshots. He looked out the window and saw at least three males and a female running towards Langdon Avenue. They ran to a black Lincoln parked at the building next to Garcia's apartment building. According to Garcia, "[t]he car just took off."

Christian Cruses lived near the intersection of Orion Avenue and Chase Street. In the early morning hours of May 15, 2016, he heard "people drinking outside the building" where he lived. They were loud and shouting the name of their gang, Langdon. Cruses observed the group, which included five males and some females, going "into the street to try [to] stop . . . cars." He took a short video depicting some of the behavior he observed that morning.

At one point, a man who appeared to be talking on his cell phone (the victim) walked by the group on the opposite side of Chase Street. A member of the group yelled, "'Stop. Where you from?'" The victim ran away, and three members of the group chased after him toward the intersection of Chase Street and Langdon Avenue. Another member went to a black Lincoln and also began to pursue the victim. Cruses then heard gunshots from a distance. Cruses told the police that one of the men wore a gray shirt and shorts, and screamed for a gun.

On May 15, 2016, at around 3:00 a.m., Anthony Trejo, then a 16-year-old minor, was "hanging out" with defendants in front of an apartment building near Orion Avenue and Chase Street. They were with a man named Luis and an older male; they had been drinking beer for two or three hours. According to Trejo, as cars passed by, members of the group, including defendants, would "throw stuff with their fingers"—i.e., Langdon gang signs.

At some point, the victim approached on the opposite side of Chase Street toward the group's location. The entire group, including Trejo and the older male, began chasing the victim down Chase Street toward Langdon Avenue. But the older male turned around and went to his car. Trejo then described how he stopped chasing the victim, using Exhibit 2 to illustrate.

"Q . . . and you begin to chase the individual towards Langdon Avenue. Correct?

"A Well, I stopped at a certain point.

"Q Where do you stop? [¶] Tell me where and I will stop—

"A Right there.

"Q Okay. [¶] Your honor, he is indicating right there where I'm going to make a mark with an "S," for stop.

"[¶] . . .

"Q [ ] Is that about right right there?

"A Yes.

"Q And then what happens?

"A And then I hear gun fire.

"Q And then what happens after that?

"A The man, he dropped. He drops. He fell.

As reflected in this exchange, the prosecutor used Exhibit 2, an aerial photograph of the scene that included a

depiction of Chase Street, Langdon Avenue, and Markelin Avenue. The "S" appears in front of a house three houses west of the intersection of Chase and Langdon. Trejo also indicated on the exhibit, with an "F," where he saw the victim drop, which was at the northwest corner of Chase and Langdon, approximately three houses east of the "S" where Trejo said he stopped. The victim's body, however, was found across and down Langdon near the front door to a residence, at 8502 Langdon Avenue.

According to Trejo, Ortega shot the victim. After the shooting, the older male arrived with his car, and Trejo, Luis, and defendants entered and drove away from the scene. Realizing he had made a "bad decision," Trejo "kept telling [the others in the car] to drop [him] off," which they eventually did.

On May 14, 2016, Adrian Alcarez, a 42-year-old West Los Angeles "Sotel" gang member,[2] made plans with his friend, Luis Gonzalez, to "hang out" and "go to [a] club." That evening, Alcarez, driving his 2003 Lincoln Town Car, picked Gonzalez up and drove to numerous clubs. During the evening, Gonzalez received a text from defendant Ortega.[3] Alcarez and Gonzalez picked up Ortega in downtown and returned to a club in Panorama City at about 1:00 a.m.

While at the club, Gonzalez received a text from defendant Lara,[4] and the group went to meet him at a Shell gas station where they purchased beer and then drove to Orion Avenue and

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2 Alcarez had been a gang member for over 30 years.

3 Ortega was introduced to Alcarez as Sicko.

4 Lara was introduced to Alcarez as Termite.

Chase Street to "hang[] out" in front of one of the apartment buildings at around 2:00 a.m. They met Trejo at the location and proceeded to drink beer.

At some point after Alcarez and the others arrived at the apartment building, he heard Ortega and "a couple of the girls that were there in the middle of the street screaming out, 'Langdon. . . . Langdon.'" They were also "throwing up their hands—throwing up the 'L' for their gang." They were "screaming randomly" at passing cars.

Alcarez saw the victim approach the group on Chase Street from Langdon Avenue, which prompted a member of the group to scream, "'Someone's creeping on us.'" Alcarez believed that statement cautioned "[e]verybody . . . to be alert." Ortega "automatically started chasing" the victim, and "everybody else gave chase," including Lara, Trejo, Gonzalez, Alcarez, and "the girls that were there." The group pursued the victim toward Langdon Street.

As Alcarez followed the group, he thought that "something's going to happen to [the victim]." He then heard shots, "freaked out," "jumped in [his] car and [he] gave chase in [his] car [in] the same direction as every[one else]." Prior to reaching Langdon Avenue, Alcarez made a "roll stop," saw Gonzalez on the other side of the street trailing the others, and told him to get in the car. Alcarez then saw Ortega and Lara, who were behind Gonzalez, follow him into the car. And, Trejo "jumped in last."[5] Alcarez felt he had to make "split second" decisions. When Ortega and Lara "jump[ed] in [his] car," he

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[5] According to Alcarez, the women in the group had their own car, but one tried unsuccessfully to ride with him.

"literally [saw] the gun. And they asked [him] for a ride. [He] had no choice but to say yes." "Lara was wearing some red shorts, white t-shirt. Maybe light gray."

Alcarez left the location with his passengers, but was "freaking out." Alcarez asked Gonzalez, "What's going to happen? I can't have these guys in my car." He replied, "Let's drop them off really quick and then . . . we'll leave." Lara told Alcarez to take defendants to Lara's mother's house. During the drive, Alcarez heard Ortega and Lara arguing about "who did what. Who shot who[m]." They were "talking about how they each took turns shooting [the victim]." Ortega said, "'Don't worry fool. I shot him. I got him [in] the neck.'" Lara replied, "'Well, I got him too.'" According to Alcarez, they were "bragging about how they shot this guy."

Alcarez felt he "had no choice" at that point but "to just . . . go along with what [defendants] wanted [him] to do." He knew defendants were going to Lara's mother's house to dispose of the weapon. They asked Alcarez how "[to] get the gun powder residue out of [their] hands" and he told them to "throw bleach on [their] hands right away."

While Alcarez was driving on the freeway, Gonzalez "freaked out," so Alcarez "stopped in the middle of the freeway [to let Gonzalez and Trejo] out of the car." Once Alcarez and defendants reached Lara's mother's house, Alcarez waited in the car while defendants went inside to "get rid of the gun" and to "try [and] wash the gun powder off." Alcarez feared retaliation if he left defendants there.

Defendants returned to Alcarez's car and told him to drop them at Lara's car on Chase Street. Alcarez dropped them off at Roscoe and Langdon, "on the other side of the crime scene."

Alcarez then picked up Gonzalez in the same vicinity, went to "an after-hours club" on Winnetka that was open all night, and met some women there. They proceeded to drink and do drugs.

Alcarez, Gonzalez, and one of the women left the club at about 10:30 a.m. Alcarez planned to drop Gonzalez and the woman back at their house, so he took a short cut that went back toward Orion Avenue and Chase Street where they had been hanging out and drinking earlier that morning. At the corner of Orion and Chase, he saw a friend and stopped to talk to him.

Alcarez then saw detectives, and one of them made eye contact with him. When the detective "g[o]t on the radio," Alcarez realized that he "just messed up" and that he "shouldn't even be around [there]." His first instinct "was to just take off," but he "realized that would only make things worse. So [he] just made a left and stopped." He exited his car to check his tires and that was "when the officers all pulled up and pulled their guns out on [him]." Alcarez was arrested, taken to the police station, and interviewed by detectives.[6]

During a break in his testimony, while counsel was in a chambers conference with the court, Alcarez, who was on the witness stand, observed Ortega "[make] a slashing motion across his throat towards [Alcarez]." Alcarez took the gesture to mean that there was "a reliable threat out [there] on the streets." The victim's sister, Joy Cuevas, who had been present in court and listened to all of Alcarez's testimony, also saw Ortega take "one finger and move[] it across [his] throat from left to right."

Los Angeles Police Detective Johnneen Jones was assigned to the homicide bureau. On May 15, 2016, at 3:15 a.m., officers

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[6] Portions of the recorded interview, some of which conflicted with Alcarez's trial testimony, were played for the jury.

received a call about a shooting near Langdon Avenue. Detective Jones arrived at the scene, 8502 Langdon Avenue, and observed the body of the victim, Samuel Cuevas. The body was below the shattered front window of a house near the front door. The detective observed two bullet strike marks on the west wall of the residence and another on "a front wooden pillar" of the carport.

Detective Jones observed a single gunshot wound in the right side of the victim's neck. The victim died from massive blood loss due to a severed carotid artery. The detective observed at the scene that the victim had $1,700 in U.S. currency clenched in his left hand and was aware that an additional $200 was recovered from the victim's person along with small amounts of methamphetamine and heroin.

At a nearby location in front of an apartment building on Chase Street, Detective Jones found evidence indicating that people had been drinking in that area, including bottles and cans of beer, cups, and broken glass. She also observed Langdon gang graffiti in the vicinity of the apartment building.

Detectives Jones and Plourde interviewed Lara after his arrest on May 16, 2016. Among other things, Lara admitted being in the vicinity of Chase and Orion on the morning of the shooting drinking beer with Gonzalez and an "older guy" who drove a Town Car. According to Lara, they "were posted . . . ." He also admitted that Ortega arrived at that location later. At the time of his arrest, Lara was wearing a "gray t-shirt, or gray polo shirt" and black shorts.

Ortega was also arrested and interviewed by police on May 16, 2016. At the time of his arrest, he was wearing a gray, long-sleeved shirt and blue shorts. He admitted that he arrived at Orion and Chase in a black car, was drinking at that location

on the morning of the shooting, and that the group he was with was "posted up," meaning they were "gang banging." But he claimed that when he heard gun shots, he "just . . . took off" with a girl.

Los Angeles Police Officer Justin Brewer was assigned to the gang enforcement detail. He was familiar with the Langdon Street gang, including the type of crimes its members committed, their tattoos, and their gang symbols and signs. Based on his training and experience, he believed Lara was a Langdon gang member from his tattoos and photographs of him throwing Langdon gang signs. Officer Brewer believed Ortega was also a Langdon gang member from photos showing his tattoos and other indicia of such gang membership.

Based on a hypothetical question that assumed facts similar to those in evidence concerning the shooting of the victim, Officer Brewer opined that the shooting described in the hypothetical was done in association with and for the benefit of a criminal street gang.

B. *Defense Case*

On May 14 and 15, 2016, Los Angeles Police Officer Mario Ververa was working downtown, assigned to the gang enforcement detail. He was patrolling in a housing development known as the Dog Town projects. At 11:59 p.m., he contacted Ortega who was standing near a bus bench speaking with a woman seated on the bench. Oretga identified himself as a Langdon Street gang member and told the officer that he currently lived in Los Angeles, but was on his way to the San Fernando Valley. Officer Ververa searched defendant and

determined that he was not armed. The encounter lasted 10 to 15 minutes.

III. PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendants[7] in count 1 with the murder of Samuel Cuevas in violation of Penal Code section 187, subdivision (a);[8] and in counts 2 and 3 with possession of a firearm by a felon in violation of section 29800, subdivision (a)(1). As to counts 1 through 3, the District Attorney alleged that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1)(C). The District Attorney further alleged as to count 1 that each defendant personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (b) through (d). The District Attorney also alleged that in the commission of the crimes, a principal personally used a firearm, personally used and discharged a firearm, and personally used and discharged a firearm causing great bodily injury. And, the District Attorney alleged as to counts 1 through 3 that each

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[7] Alcarez and Gonzalez were also charged in the information with the murder, but were not tried with defendants, who were tried jointly.

[8] All further statutory references are to the Penal Code.

defendant had been convicted of a prior strike felony within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, and each had also been convicted of a prior serious felony within the meaning of section 667, subdivision (a)(1).

The jury found defendants guilty as charged and found true the gang, firearm, and prior felony enhancement allegations. The trial court sentenced each defendant to an aggregate term of 95 years to life, comprised of the following: On count 1, a term of 25 years to life, doubled to 50 years pursuant to the prior strike conviction, plus an additional, consecutive term of 25 years to life for the firearm enhancement and an additional consecutive five-year term based on the prior serious felony conviction; and on counts 2 and 3, the upper term of three years, doubled to six years pursuant to the prior strike conviction, plus the upper term of four years for the gang enhancement and an additional consecutive five-year term for the prior serious felony conviction.

IV. DISCUSSION

A. *Motion for Acquittal*

Defendants contend that the trial court erred by ruling that Alcarez's testimony was sufficiently corroborated by independent evidence linking defendants to the murder. Defendants further contend that because Trejo was an accomplice as a matter of law, his testimony could not be relied upon to corroborate Alcarez's, in order to defeat defendants' acquittal motion.

1. Background

On June 11, 2018, Ortega filed a written motion to acquit pursuant to section 1118.1, arguing that: "The only [witnesses] tending to connect the defendants with the commission of the offen[s]e [are] Adrian Alcarez, a co-defendant, charged with murder, and Anthony Trejo, an uncharged accomplice, whose conduct is no different than that of Luis Gonzalez, also a co-defendant charged with murder. [¶] . . . The District Attorney has failed to present evidence sufficient to sustain a conviction for such offense or offenses on appeal."

At the conclusion of the People's case, Lara orally joined Ortega's motion. The trial court discussed jury instructions, specifically CALCRIM Nos. 334 and 335, and acknowledged that if the jury concluded that Trejo was an accomplice (a question the trial court concluded was appropriate for the jury to decide), Trejo's testimony could not corroborate Alcarez's to defeat the acquittal motion. The trial court concluded that there was sufficient other corroboration for the matter to proceed to the jury and denied defendants' motion for acquittal.

2. There Was Sufficient Independent Evidence Corroborating Alcarez's Testimony

a. Legal Principles

"Section 1111 provides: 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient

if it merely shows the commission of the offense or the circumstances thereof.' An 'accomplice' is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (*Ibid.*) In order for the jury to rely on an accomplice's testimony, "'[t]he corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 505 . . . .)" (*People v. Gomez* (2018) 6 Cal.5th 243, 307-308.)

Section 1118.1 provides that in a criminal jury trial, "the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged . . . if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." "'"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'" [Citation.] "The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a

prima facie case." [Citations.] The question "is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination." [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review.' (*People v. Stevens* (2007) 41 Cal.4th 182, 200 . . . .)" (*People v. Maciel* (2013) 57 Cal.4th 482, 522.)

b. Analysis

As an initial matter, and as discussed below, there was sufficient evidence to allow the jury to consider and find that Trejo was not an accomplice to the defendants' shooting of the victim. Among other facts, Trejo testified that he stopped chasing the victim before his other pursuers ultimately caught up to and shot the victim, evidence that suggested he did not share defendants' intent to corner and shoot the victim. Thus, the trial court correctly concluded that Trejo was not an accomplice as a matter of law. Based on that conclusion, the issue of whether Trejo's testimony was sufficient to independently corroborate Alcarez's testimony was a matter to be decided at trial by the jury and not by the trial court in the acquittal motion.

In addition, contrary to defendants' assertion, even without Trejo's testimony, there was sufficient independent evidence linking defendants to the murder to allow the jury to rely on Alcarez's testimony to convict them of murder. Both defendants admitted to being Langdon gang members and to drinking with other gang members the night of the murder, in the vicinity of the shooting. Both defendants also admitted to "posting up" that night near Orion Avenue and Chase Street, i.e., gang banging

and confronting anyone who came into the vicinity, just as Alcarez claimed the victim was confronted when he began walking toward the group on Chase Street. Ortega further admitted to arriving in a black car, and Lara admitted to drinking with an "older guy" who drove a Town Car. And, Oretga's slashing motion across his throat at trial during Alcarez's testimony suggested a consciousness of guilt which clearly linked him to the crime.

Moreover, eyewitness Garcia confirmed that he heard gunshots outside his apartment located in the vicinity of the shooting, saw a group of people running up Chase Street toward the site of the murder on Langdon, and then saw them run to a car and flee the area, facts that were consistent with Alcarez's version of the shooting. Similarly, eyewitness Cruses confirmed that Langdon gang members were drinking outside his apartment in the vicinity of the shooting, shouting out the gang's name, flashing the gang's sign, and trying to stop cars passing through that portion of the gang's territory, i.e., they were gang banging, just as defendants admitted they had been that evening. He also confirmed that members of that group asked a man walking toward them where he was from and then chased the man up Chase Street toward the site of the shooting on Langdon Avenue, a depiction of events that paralleled Alcarez's testimony about defendants' confrontation and pursuit of the victim before he was shot. Cruses stated that one of the members of that group wore a gray t-shirt and shorts, and screamed for a gun; both Ortega and Lara were arrested wearing a gray shirt and shorts. Cruses heard gunshots and saw one member of the group return, enter a black Lincoln, and proceed toward the site of the

shooting, conduct that was similar to Alcarez's version of the events leading up to and including the shooting.

Finally, investigating officers recovered circumstantial evidence from the scene of the shooting and the nearby scene of the drinking and gang banging that preceded the shooting that night. That evidence confirmed that multiple gunshots were fired at the victim in front of a house on the northeast corner of Chase Street and Langdon Avenue; that the victim had been struck in the neck and died at the scene; and that a group of people had been drinking beer in the vicinity where Garcia and Cruses had seen and heard them and where defendants admitted they were present.

That independent evidence corroborated key elements of Alcarez's testimony, including his description of the group in front of the Chase Street apartment drinking and yelling their gang name, prior to the shooting; the confrontation and pursuit of the victim by that group toward the Langdon Avenue shooting scene; Alcarez's return to a black Lincoln and his drive back toward the scene; and Ortega's statement in Alcarez's car after the shooting that the victim had been shot in the neck.

Under the authorities cited above, the independent evidence was sufficient to submit to the jury on the issue of whether it corroborated Alcarez's testimony and, if so, to allow the jury to consider Alcarez's testimony in determining whether to convict defendants. The trial court therefore did not err in denying the motion to acquit.

B. *Instructional Error*

Defendants contend that the trial court erred by instructing the jury with CALCRM No. 334. According to defendants: (1) the instruction was not warranted because Trejo was a direct accomplice as a matter of law or an accomplice as a matter of law under the natural and probable consequences doctrine, making instruction under CALCRIM No. 334 unnecessary; (2) the trial court's comments during the reading of CALCRIM Nos. 334 and 335 suggested to the jury that, although the evidence was sufficient to show Alcarez was indisputably an accomplice, it was insufficient to show that Trejo was an accomplice; (3) the instruction on accomplice liability in CALCRIM No. 334 was incomplete because, although it instructed on the primary theory of accomplice liability supported by the evidence (Trejo shared defendants' intent to commit murder), it failed to instruct on the alternative theory of liability supported by the evidence under the natural and probable consequences doctrine (Trejo shared an intent to commit a target crime other than murder); and (iv) the use of the term "slight" evidence in CALCRIM No. 334 impermissibly reduced the prosecution's burden of proving defendants' guilt.

1. Background

The trial court first discussed the proposed jury instructions in considering defendants' motion for acquittal. It stated, "I think it's pretty clear here Mr. Alcarez is an accomplice[,]" which the People conceded. The trial court concluded, however, that Trejo was not an accomplice, as a

matter of law: "The evidence that came out as to Mr. Trejo is different, though. Mr. Trejo is a minor. I think he was 16 years old at the time. Hanging out, drinking beer. Trying to act tough with the guys from the gang. And he basically gives chase after the others give chase. He is kind of following them along. [¶] At which time he hears the gunshots, makes a U-turn and runs back. And he eventually gets in the car. [¶] So in my mind, again, this was a factual question for the jury, but was he merely present as opposed to a perpetrator and/or an accomplice?"

Based on its ruling that Alcarez was an accomplice as a matter of law, the trial court instructed the jury with CALCRIM No. 335 entitled: "Accomplice Testimony: No Dispute Whether Witness Is Accomplice." That instruction advised the jury that Alcarez was an accomplice to the murder and felon in possession of a firearm charges, that defendants could not be found guilty based on an accomplice's testimony alone, and that the jury could use testimony of an accomplice to convict only if: "1. The accomplice's statement or testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's statement or testimony; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime."

In addition, based on its conclusion that the issue of whether Trejo was an accomplice was a disputed factual issue for the jury, the trial court instructed the jury with CALCRIM No. 334 which advised: "Before you may consider the statement or testimony of Anthony Trejo as evidence against the defendants, you must decide whether Anthony Trejo was an accomplice. A person is an accomplice if he is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if: [¶] 1. He personally committed the crime; [¶] OR [¶] 2. He knew of the criminal purpose of the person who committed the crime; [¶] AND [¶] 3. He intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime. [¶] The burden is on the defendant to prove that it is more likely than not that Anthony Trejo was an accomplice." [¶] . . . [¶]"

The court also informed the parties during the jury instruction conference that it had modified CALCRIM No. 301—Single Witness's Testimony.[9]

The trial court then had the following exchange with counsel concerning its intent to give both CALCRIM Nos. 334 and 335: "[CALCRIM No.] 334. [¶] And again, this is accomplice testimony. 'Dispute whether witness is an accomplice.' This applies to . . . Trejo. [¶] [CALCRIM No.] 335. That's accomplice

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[9] As modified, the version of CALCRIM No. 301 given to the jury read as follows: "Except for the testimony of Adrian Alcarez, which requires supporting evidence, the testimony of only one witness can prove any fact. This instruction may also apply to Anthony Trejo, depending on your findings based on the evidence presented, in light of jury instruction 334. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

testimony. 'No dispute whether the witness is an accomplice.' That's . . . Alcarez. [¶] Actually, legally, if you look at the use notes to [No.] 335, there's a case called [*People v. Hill* (1967)] 66 Cal.2d 536. I am not 100 percent sure this instruction applies to Alcarez, but I am going to give it anyway. [¶] No objection? [¶] [Prosecutor]: No. [¶] The Court: All right. So we are going to give it. [¶] [Ortega's Counsel]: Which— [¶] The Court: [No.] 335. That's the one you want."

The trial court thereafter instructed the jury, without any objection from defendants' counsel, with the versions of Nos. 334 and 335 described above. Between reading No. 334 and No. 335, the trial court addressed the jury about the differences between the two instructions. "So here's the difference. I am telling you as a matter of law, . . . Alcarez was an accomplice. I am saying . . . Trejo, that's up to you to decide whether or not he was an accomplice. I am not saying he was an accomplice as a matter of law. I am saying it's a factual decision for the jury to make as to Trejo. [¶] Understood? [¶] The lawyers hopefully will address that."

2. Legal Principles/Forfeiture

In *People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*), the Supreme Court explained the well recognized rule that a trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel, citing *People v. Kelly* (1992) 1 Cal.4th 495, 535 [the trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel]. The court in *Lee* also reiterated the corollary rule that failure to

request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal, citing *People v. Rundle* (2008) 43 Cal.4th 76, 151 [the long-standing general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given]; and *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 [generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language].

3. Analysis

Here, as defendants concede, defendants' trial counsel did not object to the trial court's stated intent to instruct with CALRIM Nos. 334 and 335. Similarly, it is undisputed that defendants' trial counsel did not request that the trial court modify, clarify, or explain either instruction.

If, as defendants now contend for the first time on appeal, Trejo's status as an accomplice to the murder was factually undisputed, it was incumbent upon their trial counsel to object to the giving of CALCRIM No. 334 as unnecessary and potentially confusing to the jury. The failure to make such an objection therefore forfeited any such claim on appeal.

Similarly, assuming both instructions were warranted by the facts and correct statements of the law, but the trial court's explanation of the interplay between the two was potentially misleading, defendants' trial counsel had a duty to request a clarifying advisement to cure any such potential to mislead. The

failure to request such a clarification forfeited that claim on appeal.

Moreover, because CALCRIM No. 334 correctly stated the law concerning direct accomplice liability, the claim that it should also have included an instruction on the natural and probable consequences theory of accomplice liability constitutes, in effect, a claim that the instruction was incomplete. Because defendants did not request any modification to CALCRIM No. 334, defendants' claim of error on appeal based on that purported defect has been forfeited.

Finally, defendant's argument that the inclusion of the term "slight evidence" in the challenged instructions violated due process was not raised in the trial court. That argument suggests that the language of the instruction had the potential to mislead the jury concerning the quantum of proof necessary to convict defendants. Because, as explained below, that instruction was an accurate statement of California law on the use of accomplice testimony, defendants were required under the authorities cited above to request clarifying language to ensure that the jury was not misled. Their failure to make such a request in the trial court forfeits the contention on appeal.[10]

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[10] Lara argues in his reply brief that, to the extent he forfeited his objections to CALCRIM No. 334, he received ineffective assistance of counsel. We disagree.

The principles governing a claim of ineffective assistance of counsel are well established. "A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first

But even if we consider the merits of defendants' instructional error claims, none of them has merit. Defendants' assertion that CALCRIM No. 334 should not have been given because Trejo was an accomplice as a matter of law is not supported by the evidence. Unlike the 42-year-old, lifelong gang member Alvarez, who voluntarily drove to the scene of the shooting to pick up Gonzalez and then drove the defendants away from the scene so they could hide the gun and wash off gun powder residue, Trejo was a minor who was drinking with defendants and the others on Chase Street and who initially

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show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Here, as explained below, counsel's failure to object to CALCRIM No. 334 on the various grounds now raised on appeal did not fall below an objective standard of reasonableness. Therefore, defendants cannot show that they received ineffective assistance of counsel at trial.

followed defendants as they chased the victim. But Trejo testified that he broke off from the group and stopped his pursuit down the street from the location of the shooting, prior to any gunshots. He also demanded that Alcarez stop the car and let him out after the shooting. That evidence supported the trial court's conclusion that the issue of whether Trejo shared defendants' intent to kill was a disputed fact issue for the jury to decide. Moreover, as explained below, an accomplice theory of liability under the natural and probable consequences doctrine was not supported by the evidence. Thus, the trial court did not err by instructing with CALCRIM No. 334.

Defendants' complaint about the trial court's short explanation to the jury about the differences between CALCRIM Nos. 334 and 335 fares no better. The trial court's explanation was straight-forward and accurate, such that it had no potential to mislead the jury.

Defendants' assertion that the trial court should have advised the jury sua sponte concerning the natural and probable consequences theory of accomplice liability has no support in the evidence. Other than the charged crimes of murder and possession of a firearm by a felon, the evidence does not support an inference that Trejo could have shared an intent with defendants to commit a target crime against the victim, such as an assault or a robbery. There was no evidence of a physical struggle with the victim prior to the shooting, and the cash and drugs that the victim was carrying that night were not taken.

Finally, defendants' argument concerning the "slight evidence" language of CALCRIM Nos. 334 and 335 ignores the fact that the challenged language is taken directly from California Supreme Court decisions such as *People v. Gomez,*

supra, 6 Cal.5th at pages 307 to 308 and *People v. Abilez, supra*, 41 Cal.4th at page 505. It was therefore a correct statement of California law on the use of accomplice testimony. Thus, we cannot conclude that its use in the challenged instructions constituted prejudicial error.

Contrary to defendants' assertion, the decision in *Carmell v. Texas* (2000) 529 U.S. 513, does not suggest or imply that the "slight evidence" language in issue in this case operated to reduce the prosecution's burden of proving murder. There, the statute in issue made corroborating evidence of a sexual assault victim's testimony an essential element of the crime charged. (*Id.* at pp. 517-519.) Here, corroborating evidence is not an element of the crimes charged; it is a threshold evidentiary requirement for the use of accomplice testimony to convict a defendant of any crime. It follows that such evidence does not need to be proven beyond a reasonable doubt. (See *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146-147.)

C. *Resentencing*

In a supplemental letter brief, defendant Ortega contends that the matter should be remanded for resentencing because the firearm and prior serious felony enhancement statutes under which he was sentenced have been modified by Senate Bill No. 620 (firearm enhancements) and Senate Bill No. 1393 (prior serious felony enhancements) to provide the trial court with discretion to strike those enhancements. (See §§ 12022.53, subdivision (h), 12022.5, subdivision (c), and §§ 667, subdivision (a) and 1385.) The Attorney General addresses only the modification under Senate Bill No. 1393 to sections 667 and 1385,

and argues that the record of the sentencing reflects that the trial court would not have exercised its discretion to strike the prior serious felony enhancements.

Senate Bill No. 620's modifications to sections 12022.53 and 12022.5 became effective on January 1, 2018, and defendants were sentenced on February 27, 2018. Thus, those sections, as modified, applied to defendants' original sentencing and, pursuant to established authority, we presume the trial court was aware of its discretion to strike under those amended sections and decided not to strike the firearm allegations. (Evid. Code, § 664; *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1178-1179.) Remand for resentencing under Senate Bill No. 620 therefore is not appropriate.

As for the amendments to sections 667 and 1385 under Senate Bill No. 1393, the record does not establish that the trial court would not have exercised its discretion to strike the prior serious felony enhancements under section 667, subdivision (a). We therefore remand the matter for further proceedings to address that issue.

V. DISPOSITION

The cause is remanded to the trial court to permit the court to consider whether to exercise its discretion to strike defendants' section 667, subdivision (a) enhancement under section 1385. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.